UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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San Francisco, CA 94105-3901

NOV 29 2006

Tom Howard
Acting Executive Director
California State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Dear Mr. Howard:

On February 27, 2006, the U.S. Environmental Protection Agency ("EPA") partially approved the amendment to the *Water Quality Control Plan for the North Coast Region* ("Basin Plan") that incorporates language authorizing the inclusion of compliance schedules in National Pollutant Discharge Elimination System ("NPDES") permits. In our letter of February 27, 2006, we indicated that for certain portions of the amendment, we were not taking action at that time, but were continuing to review those portions of the amendment.

We have now completed our review of those portions of the amendment. After careful consideration, we are approving the third specific provision of the amendment and the extension provision. However, we are disapproving the second specific provision of the amendment. The rationale for our action is discussed below in this letter. Additionally, some of the issues discussed in this letter are also discussed in more detail in the attached Discussion of Selected Issues.

The subject amendment was adopted by the North Coast Regional Water Quality Control Board ("Regional Board") on March 24, 2004 (Regional Board Resolution No. R1-2004-0011). The amendment was partially approved by the State Water Resources Control Board ("SWRCB") on November 18, 2004, under Resolution No. 2004-0078. On August 18, 2005, the California Office of Administrative Law ("OAL") approved the amendment as approved by the SWRCB. The Regional Board's amendment, as approved by the SWRCB ("the amendment"), is found on pages 114-117 of the State's Administrative Record ("AR"). It was submitted to EPA on August 31, 2005. On December 15, 2005, Stan Martinson, Chief of the Division of Water Quality at the SWRCB, forwarded to EPA a memorandum from the Regional Board Executive Officer, dated December 13, 2005, clarifying certain components of the amendment. On February 27, 2006, EPA partially approved the amendment. A copy of the partial approval letter is enclosed.

Section 303(c) of the Clean Water Act ("CWA") requires EPA to review and approve or disapprove new or revised water quality standards submitted by the State.

Under EPA's water quality standards regulations, the State has discretion to include in its standards "policies generally affecting their application and implementation, such as mixing zones, low flows and variances." 40 CFR § 131.13. Though discretionary with the State, the Administrator has stated that authorizing provisions for compliance schedules such as those under review today fall within the category of implementation policies and procedures subject to EPA review under 40 CFR § 131.13. *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 182-183, n. 16 (Adm'r 1990), *modification denied*, 4 E.A.D. 33 (EAB 1992); *In re City of Ames*, 6 E.A.D. 374 (EAB 1996). As such, authorizing provisions for compliance schedules are subject to EPA review and approval under CWA section 303(c).

The Amendment

Regional Board Resolution No. R1-2004-0011, as approved by SWRCB Resolution No. 2004-0078, amends the Basin Plan by adding language to Chapter 3, *Water Quality Objectives*, and Chapter 4, *Implementation Plans*, that sets forth three specific provisions that authorize the Regional Board to establish schedules of compliance in NPDES permits under three sets of circumstances. In our February 27 letter, we approved the amendment as to the first specific provision, but took no action on the second and third specific provisions, nor on any portion of the amendment that applies solely to the second or third specific provisions. Additionally, we took no action on the provision in the amendment that allows a permittee to apply for up to a five-year extension to a compliance schedule.

First Specific Provision

In the February 27 letter, EPA approved the first specific provision. This provision authorizes the Regional Board to establish schedules of compliance under specific circumstances as follows:

> Where an existing discharger has demonstrated, to the Regional Water Board's satisfaction, that it is infeasible to achieve immediate compliance with effluent and/or receiving water limitations specified to implement new, revised or newly interpreted water quality objectives, criteria or prohibitions.

EPA also approved related provisions, for example, provisions limiting the length of the compliance schedule to five years, and requiring the final compliance date to be based on the shortest feasible time required to achieve compliance. Any provisions of the amendment that we approved in our February 27, 2006, decision are not altered by today's decision and remain in effect.

Second Specific Provision

In the February 27 letter, EPA took no action on the second specific provision. This provision authorizes the Regional Board to establish schedules of compliance under specific circumstances as follows:

> Where a discharger currently operating under a non-NPDES permit who – under new interpretation of law, is newly required to comply with NPDES permitting requirements – demonstrates to the Regional Board's satisfaction that it is infeasible to achieve immediate compliance with newly imposed effluent and/or receiving water limitations specified to implement objectives, criteria, or prohibitions adopted, revised, or reinterpreted after July 1, 1977, and that were not included in the non-NPDES permit.

After careful consideration, we have concluded that this provision is inconsistent with EPA's regulations governing compliance schedules. EPA's regulations at 40 CFR §122.47 specify that the first NPDES permit issued to a new discharger may contain a compliance schedule only under very limited circumstances – when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge. The definition of "new discharger" applicable to §122.47 is found in EPA's regulations at 40 CFR §122.2, which defines "new discharger" as "any ….facility…that did not commence the 'discharge of pollutants' at a particular 'site' prior to August 13, 1979 … and [w]hich has never received a finally effective NPDES permit for discharges at that 'site.'" Thus, a discharger that began discharging after August 13, 1979 and has never had an NPDES permit would not be eligible for a compliance schedule unless it met the strict conditions for granting of compliance schedules for new dischargers in §122.47.

The second specific provision, however, would allow certain dischargers that are new dischargers under EPA's definition at 40 CFR §122.2 to be treated as existing dischargers and thus be able to receive compliance schedules not allowed by EPA's regulations. The second specific provision allows compliance schedules for "existing non-NPDES dischargers" (AR p. 114), and, through its definition of "existing discharger," allows a discharger that does not have an NPDES permit but began construction prior to the effective date of the amendment (which would be the EPA approval date) to be treated as an existing discharger that would apparently not be subject to the restrictions on new dischargers in §122.47.[1]

[1] The amendment defines "existing discharger" in two nearly-identical footnotes, both numbered 3, on pages 114 and 115 of the AR ("Footnote 3"). Footnote 3 defines an "existing discharger" as "any discharger (non-NPDES or NPDES) that is not a new discharger," and defines a "new discharger" as one that commenced construction after the effective date of the amendment.

Similarly (but not identically), the amendment allows a compliance schedule for "a discharger currently operating under a non-NPDES permit" (AR, p. 115), and defines "currently operating" as "a discharger operating under a non-NPDES permit on or before approval of this amendment by USEPA" (AR p. 115, footnote 5). Neither the "existing discharger" definition nor the "currently operating" definition is consistent with the EPA regulations at §§122.47 and 122.2, under which such dischargers would not be eligible for a compliance schedule unless they were "existing dischargers" under § 122.2 (i.e., pre-1979 dischargers) or unless the conditions set forth in § 122.47 were met. Based on this fundamental inconsistency, under which any discharger that began operations under a non-NPDES permit during the period 1979-2006 would appear to be eligible for a compliance schedule under the amendment -- when they would not be under the EPA regulations -- we are compelled to disapprove the second specific provision.[2]

Extension Provision

The Basin Plan amendment provides the following duration limitations for compliance schedules established pursuant to the first specific provision:

> Schedules of compliance in NPDES permits for existing NPDES permittees shall be as short as feasible, but in no case exceed the following:
>
> Up to five years from the date of permit issuance, re-issuance, or modification that establishes effluent and/or receiving water limitations specified to implement new, revised, or newly interpreted objectives, criteria, or prohibitions. A permittee can apply for up to a five-year extension, but only where the conditions of the schedule of compliance have been fully met, and sufficient progress toward achieving the objectives, criteria, or prohibitions has been documented.
>
> In no case shall a schedule of compliance for these dischargers exceed ten years from the effective date of the initial permit that established effluent and/or receiving water limitations specified to implement new, revised, or newly interpreted objectives, criteria, or prohibitions.

In the February 27 letter, we approved the five-year limit, but took no action on the extension provision.

We are now approving the extension provision. This provision is consistent with the CWA and with EPA regulations. We note that the provision specifically requires that

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[2] EPA notes that the second specific provision is also inconsistent with California law because California has incorporated by reference EPA's permitting regulations (including 40 CFR §122.47 and §122.2) through California Water Code section 13370 and 23 Code of Regulations section 2235.2 ("Waste discharge requirements for discharge from point sources to navigable waters shall be issued and administered in accordance with the currently applicable federal regulations for the .... NPDES program.").

the extension only be granted when the conditions of the schedule of compliance have been fully met, and sufficient progress toward achieving the objectives, criteria, or prohibitions has been demonstrated. This was clarified in the Regional Board Executive Officer's clarification letter of December 13, 2005, which states as follows:

> A permittee will be required to have met all the conditions of the compliance schedule aspects of their permit including all interim milestones before the Regional Water Board will consider an extension of their compliance schedule. It is envisioned, however, that under certain circumstances an extension might be warranted if unforeseen circumstances beyond the control of the permittee arise that preclude achieving the final objective, criterion, or prohibition, even though interim milestones have been fully met. Examples of such events could be a natural disaster, a binding court ruling arising from a third-party lawsuit, or a new treatment system not functioning as anticipated.

We find this provision to be consistent with 40 CFR §122.62(a)(4). We also note that this provision must be used in conjunction with the requirement in the amendment that compliance schedules be as short as feasible, and the requirements for submission of information to justify the need for a compliance schedule (AR p. 117). Therefore, we are approving this provision.[3]

Third Specific Provision

In the February 27 letter, EPA took no action on the third specific provision. This provision authorizes the Regional Board to establish schedules of compliance under specific circumstances as follows:

> Where a discharger is required to comply with TMDLs adopted as a single permitting action, and demonstrates that it is infeasible to achieve immediate compliance with effluent and/or receiving water limits that are specified to implement new, revised, or newly interpreted objectives, criteria or prohibitions.

The amendment provides that schedules of compliance adopted pursuant to this provision "shall require compliance in the shortest feasible period of time, but may extend beyond ten years from the date of permit issuance." Additionally, the amendment defines "new, revised, or newly interpreted" objectives, criteria or prohibitions to mean objectives that are adopted, revised, or newly interpreted after the effective date of the amendment. The requirements for submission of

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[3] The amendment also includes an extension provision for compliance schedules issued pursuant to the second specific provision. As we are today disapproving the second specific provision. it is not necessary for EPA to take a separate specific action with regard to the provision allowing extensions under the second specific provision. Because the second specific provision is disapproved, the extension provision related to it is not in effect.

information to justify the need for a compliance schedule (AR p. 117) apply to "all applicants"; thus, they apply to this specific provision as well as to the first.

EPA now approves this portion of the amendment. While this provision allows establishment of a compliance schedule that extends beyond the term of a five-year permit, neither the Clean Water Act nor EPA's regulations limit the duration of an otherwise permissible compliance schedule to the five-year permit term. Rather, the requirement in the EPA regulations – as in this amendment – is that when there is a compliance schedule, the final water quality-based effluent limitation be achieved as soon as possible. The five-year permit term required by CWA sec. 402(b)(1)(B) does not establish a statutory deadline for meeting water quality-based effluent limitations. Rather, this provision of the statute requires that any state seeking approval to administer its own NPDES program has authority to issue permits for a fixed term, not exceeding five years, so that the state will revisit its authorizations to discharge every five years.[4]

While compliance schedules may extend beyond the term of an NPDES permit, it is important to reiterate that any compliance schedule must be consistent with the Clean Water Act's definition of "schedule of compliance." The Act defines "schedule of compliance" as "an enforceable series of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." CWA sec. 502(17). Where there is an effective authorizing provision for compliance schedules, and a permit authority wants to include a compliance schedule that exceeds the permit term, but it is possible that the permit could be administratively extended,[5] the permitting authority will need to ensure that all of the compliance schedule milestones are enforceable. Inclusion of all the actions necessary under the compliance schedule, including the interim requirements and the final effluent limitation, as terms of the permit will ensure that the permit will be consistent with the definition of compliance schedule in the CWA, and will also ensure consistency with the regulatory definition of compliance schedule as a "schedule of remedial measures included in a 'permit'...." 40 CFR §122.2. Additionally, inclusion of the entire compliance schedule will ensure that the permit contains "requirements...necessary...to [a]chieve WQS," as required by 40 CFR §122.44(d)(1), and limits "derived from, and [that comply] with" water quality standards (40 CFR §122.44(d)(1)(vii)) – requirements implementing the CWA's requirement in section 301(b)(1)(C) to include "any more stringent limitation, including those necessary to meet water quality standards." By including the entire compliance schedule as an enforceable provision of the permit, the Regional Board will ensure that the permittee must meet the compliance schedule milestones that occur after the term of the permit

[4] When EPA is the permit-issuing authority, EPA also is required to issue permits with fixed terms, not exceeding five years.

[5] Where a permittee for an activity of an ongoing nature properly applies for renewal of a permit, the permit may remain in effect beyond the end date of the permit in accordance with section 558(c) of the Administrative Procedure Act, 5 U.S.C. § 558(c), EPA permit regulations at 40 CFR § 122.6, and California's administrative continuance provision at 23 CCR § 2235.4.

regardless of whether the permit is reissued prior to the date of the milestones or whether the permit is administratively extended pending reissuance.[6]

Thus, even though it is not legally required that compliance schedules be limited to five years and/or the permit term, the Regional Board, when it issues permits, must nevertheless establish enforceable requirements leading to compliance with the final effluent limitation. Furthermore, because the amendment itself requires all compliance schedules authorized by the amendment to be as short as feasible and to include interim milestones, it can be expected that any compliance schedule that exceeds five years and/or the term of the permit will be developed to meet the final effluent limitation as soon as possible.

Other Portions of the Amendment and Effects of EPA's Actions

As a result of today's disapproval, the second specific provision is not in effect for CWA purposes. 40 CFR § 131.21(c). Footnote 5 (AR p. 115) has no independent effect aside from the second specific provision and is also not in effect for CWA purposes. Similarly, the provisions in the amendment regarding information a discharger must submit in order to obtain a compliance schedule pursuant to the second specific provision (AR p. 117), and the provision regarding extensions of compliance schedules under the second specific provision (AR p. 116), have no independent effect aside from the second specific provision and are not in effect for CWA purposes. Therefore, it is not necessary for EPA to take a separate specific action with regard to these provisions.

Under EPA regulations at 40 CFR §§ 131.21 and 131.22, if EPA disapproves a State's water quality standards submission, it must specify the changes needed to meet the applicable requirements of the Act and EPA regulations, and if the State does not adopt the changes, EPA shall propose and promulgate a standard including the changes. In this letter, we have specified where the disapproved provision is inconsistent with EPA regulations. Therefore, if the State chooses to revise and re-submit the disapproved provision, in order for it to be approvable, it must be made consistent with the regulations applicable to compliance schedule-authorizing provision discussed in this letter. However, the State may also choose not to revise and re-submit the disapproved provision. In that situation, there would be no changes needed in California's water quality standards, because a compliance schedule-authorizing provision is a discretionary element of a State's water quality standards regulations under the CWA. Because the State's standards do not need a compliance schedule-authorizing provision in order to be consistent with the CWA, it is not necessary for EPA to promulgate alternative provisions in response to our disapproval of the second specific provision. As a practical matter,

[6] In the December 12, 2005, clarification letter, the Regional Board indicated it would include the entire compliance schedule in the fact sheet for the permit. We agree this should be done, and do not think this commitment in any way would preclude the Regional Board from including the entire schedule, including the final effluent limitation, as enforceable permit provisions.

moreover, as a result of our actions approving the first and third specific provisions, Regional Board 1 has a compliance schedule-authorizing provision in place.

Other than the second specific provision and the provisions implementing the second specific provision, as discussed above, the reminder of the Basin Plan amendment was either approved in our February 27, 2006, decision or is considered included in today's decision, and is in effect for Clean Water Act purposes.

Conclusion

We appreciate your patience during EPA's review of the subject amendment. If you have any questions regarding our action, please contact Suesan Saucerman, of my staff, at (415) 972-3522, or Suzette Leith, in our Office of Regional Counsel, at (415) 972-3884. As always, we look forward to continued cooperation with the State in achieving our mutual environmental goals.

Sincerely yours,

Alexis Strauss 29 Nov. 2006
Alexis Strauss, Director
Water Division

Enclosure:
Discussion of Selected Issues dtd November 29, 2006
EPA ltr.to C. Cantú dtd Feb. 27, 2006

cc:
Catherine Kuhlman, North Coast Regional Water Quality Control Board
Darrin Polhemus, State Water Resources Control Board, Division of Water Quality
Caroline Whitehead, U.S. EPA, Office of Water (4305)

DISCUSSION OF SELECTED ISSUES

(Enclosure to decision letter dated November 29, 2006, regarding Regional Board 1 Basin Plan amendments authorizing compliance schedules)

Date: November 29, 2006

A. INTRODUCTION

This memorandum documents EPA Region 9's consideration of certain issues raised during the administrative process concerning the Basin Plan amendment ("amendment") submitted by the North Coast Regional Water Quality Control Board ("Regional Board 1" or "RB1"), which incorporates language authorizing the inclusion of compliance schedules in National Pollutant Discharge Elimination System ("NPDES") permits. The State submitted the amendment to EPA on August 31, 2005, and on December 15, 2005, the State forwarded to EPA a memorandum from the Regional Board Executive Officer dated December 13, 2005, clarifying certain components of the amendment.

In our review of the amendment, we considered comments raised during the State's administrative proceeding. While EPA is not required to solicit public comment prior to making a decision of this type, we considered the issues raised by the commenters and are here documenting our consideration of these issues.

B. SUMMARY OF AMENDMENT AND EPA ACTIONS

On February 27, 2006, EPA partially approved the amendment and deferred action on other portions of the amendment. The portion approved by EPA included the first of three specific compliance schedule-authorizing provisions. The first specific provision allows compliance schedules when an existing discharger has demonstrated that it is infeasible to achieve immediate compliance with effluent limitations specified to implement new, revised, or newly interpreted water quality standards. These compliance schedules are limited to five years.

In the February 27, 2006 decision, EPA deferred action on the second specific provision of the amendment, which authorizes use of compliance schedules when an

existing non-NPDES discharger, due to a new interpretation of law, is newly required to comply with NPDES permitting requirements. We are today disapproving this specific provision for the reasons explained in today's decision letter.

In the February 27, 2006 decision, EPA also deferred action on the third specific provision of the amendment, which authorizes use of compliance schedules when an existing discharger is required to comply with a Total Maximum Daily Load ("TMDL") adopted as a single permitting action and demonstrates that it is infeasible to achieve immediate compliance with effluent limitations specified to implement new, revised, or newly interpreted objectives, criteria, or prohibitions. EPA is today approving this provision, as discussed in today's decision letter. This Discussion of Selected Issues primarily addresses issues related to this provision.

Finally, in the February 27, 2006 decision letter, EPA deferred action on a provision allowing a five-year extension of a compliance schedule authorized under the first or second specific provision if the permittee has met all the conditions of the compliance schedule and has documented sufficient progress toward achieving the water quality standard, but cannot meet the final effluent limitation. EPA is today approving this provision as to the first specific provision, as discussed in today's decision letter. Some of the issues discussed in this Discussion of Selected Issues also deal with this provision. (As noted in the decision letter, because we are disapproving the second specific provision, the extension provision related to that provision is not in effect for Clean Water Act purposes.)

C. EPA REVIEW OF COMPLIANCE SCHEDULE-AUTHORIZING PROVISIONS

1. Statutory and Regulatory Authorization of Compliance Schedules for Water Quality-Based Effluent Limitations

When Congress enacted the Federal Water Pollution Control Amendments in 1972 (known today as the Clean Water Act ("CWA")), Congress established the NPDES permitting program. Congress included as one of the features of this new permitting program the recognition that permits could include schedules of compliance that allow dischargers time, where appropriate, to come into compliance with requirements in their permits. The Clean Water Act defines the term "schedule of compliance" to mean "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." (CWA sec. 502(17)).[1] The Act further defines "effluent limitation" to mean any restriction established by the Administrator or a State "including schedules of compliance." (CWA sec. 502(11)).

[1] Throughout this document, "compliance schedule" and "schedule of compliance" are used interchangeably.

The focus of EPA's current approval/disapproval decision relates to RB1 amendments that would authorize use of compliance schedules to allow dischargers time to achieve compliance with permit requirements based on new or revised (or newly interpreted) State water quality standards. The CWA requires that NPDES permits include effluent limitations as stringent as necessary to meet "water quality standards." (CWA sec. 301(b)(1)(C)). Such "water quality-based effluent limitations" implement a central program of the Act, the adoption by the States of water quality standards, expressing the goals and water quality objectives for all interstate and intrastate waters. Section 303(c) of the CWA requires each state, subject to federal approval, to adopt water quality standards for its waters. *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 704 (1994). States have the primary authority for establishing water quality standards.[2] Water quality standards provide "a supplementary basis * * * so that numerous point sources, despite individual compliance with [technology-based] effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976).

Section 303(a) of the CWA required that State water quality standards that were in effect as of October 18, 1972, remain in effect unless the Administrator determined such standards were not consistent with the Act. Section 303(c)(1) requires the States to review their water quality standards and revise them, as appropriate, once every three years. As States adopt new or revised water quality standards, NPDES permits, upon reissuance, will need to include effluent limits as stringent as necessary to meet these new or revised standards. Recognizing that States would be continually reviewing and revising their water quality standards, Congress also provided that States should adopt plans for implementing those standards, and that such plans would include "schedules of compliance, for revised or new water quality standards, under [section 303(c)]" of the Act. (CWA sec. 303(e)(3)((F)).

Section 301(b)(1)(C), which requires that permits include effluent limits as stringent as necessary to meet water quality standards, includes the introductory words "not later than July 1, 1977." EPA has never interpreted those words to apply to effluent limitations included in permits to meet *new or revised* water quality standards that States adopt *after* July 1, 1977, Indeed, EPA promulgated regulations in1979 setting forth procedures and requirements for the inclusion of compliance schedules in NPDES permits. 40 CFR. §122.47.

When the issue of whether compliance schedules could be included in NPDES permits for water quality-based effluent limitations was presented to the EPA

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[2] *NRDC v. EPA*, 16 F.3d 1395, 1401 (4th Cir. 1993); *City of Albuquerque v. Browner*, 97 F.3d 415, 425 (10th Cir. 1996) ("states have the primary role, under § 303 of the CWA (33 U.S.C. § 1313), in establishing water quality standards. EPA's sole function, in this respect, is to review those standards for approval.") See also *American Wildlands et al. v Browner et al.*, 260 F.3d 1192, 1194 (10th Cir. 2001) ("Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards by states . . .") (quoting *City of Albuquerque,* 97 F.3d at 425); *Mississippi Comm'n on Natural Resources v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980) ("The [CWA] requires EPA to determine whether the standard is 'consistent with' the Act's requirements.").

Administrator in 1990, the Administrator set forth EPA's interpretation of the CWA and EPA's regulations. EPA's Administrator interpreted CWA section 301(b)(1)(C) to mean that NPDES permits must require immediate compliance with, and therefore may *not* contain compliance schedules for, water quality-based effluent limitations based on water quality standards adopted *before* July 1, 1977. However, for new or revised water quality standards, adopted *after* July 1, 1977, compliance schedules may be allowed in permits to meet effluent limits based on such new or revised effluent limits "if a State has laid the necessary groundwork in its standards or implementing regulations." *In the Matter of Star-Kist Caribe, Inc.,* 3 Environmental Administrative Decisions ("E.A.D.") 172, 176-7 (1990).

Therefore, if a State adopts a new or revised water quality standard after July 1, 1977, the State also may authorize the permitting authority to provide time, through a schedule of compliance, for a permittee to comply with an effluent limitation implementing that new or revised water quality standard. EPA's Environmental Appeals Board, in its 1992 *Star-Kist Caribe* decision denying a request for modification of the Administrator's decision, reiterated the Administrator's interpretation that "it is possible…for the States to modify their water quality standards (including associated provisions...for schedules of compliance)…". *In the Matter of Star-Kist Caribe, Inc.,* 4 E.A.D. 33 at 38, and note 16.

The Administrator's interpretation of section 301(b)(1)(C) is consistent with the provision in 303(e) of the CWA in which Congress recognized that States may provide for schedules of compliance for implementing new or revised water quality standards. As discussed above, Section 303(e)(3)(F) expressly provides that states develop plans for implementation of their water quality standards, including schedules of compliance, for revised or new water quality standards adopted under section 303(c). The Administrator's decision also reinforced the primacy of the States in protecting their water quality by ensuring that unless the State authorizes compliance schedules for meeting effluent limitations based on standards the State adopts or revises after July 1, 1977, no such compliance schedules will be allowed. Finally, the Administrator's decision recognized that States will be continually adopting new or revised water quality standards and that it was reasonable for the States to allow some time for dischargers to comply with effluent limits included in future permits designed to meet those requirements.

It is consistent with the Administrator's decision in *Star-Kist Caribe* for permitting authorities to include a compliance schedule in NPDES permits implementing new or revised water quality standards when the State has included a provision authorizing such compliance schedules in its water quality standards or implementing regulations. *In the Matter of Star-Kist Caribe, Inc.,* 3 E.A.D. 172, 177, 184-5 (1990). Where EPA has promulgated new or revised water quality standards, EPA itself has authorized use of compliance schedules for effluent limitations based on those new or revised standards, recognizing that dischargers reasonably may need some time to meet limitations in NPDES permit based on these new, more stringent criteria. See Great Lakes Water Quality Guidance (40 CFR Part 132, Appendix F, Procedure 9.B.2), the

California Toxics Rule (40 CFR §131.38(e)(7)), and the BEACH Act Rule (40 CFR §131.41(f)(7)).

EPA also believes it is reasonable to treat water quality standards that were adopted prior to July 1, 1977 in the same manner as "new or revised" standards adopted after July 1, 1977, *if* the State has adopted a new interpretation of that pre-July 1, 1977 standard. For example, this may occur when a State has a narrative criterion such as "no toxics in toxic amounts." If the State for the first time interprets what that narrative criterion means for a specific pollutant, e.g., no than x mg/l, EPA believes such a "newly interpreted" standard is much more analogous to a new or revised standard than a standard that has been in place since before July 1, 1977. EPA explicitly acknowledged that compliance schedules may be appropriate in this situation in its 1994 Whole Effluent Toxicity (WET) Control Policy (EPA 833-B-94-002, July 1994), p. 12.

Such newly interpreted standards may result in more stringent water quality-based effluent limitations than a discharger might have anticipated based on the words of the pre-1977 standard. Compliance with effluent limitations based on the newly interpreted standards may not be immediately attainable, and a compliance schedule would allow those water quality-based effluent limitations to be attained over a reasonable period of time, with concrete steps required to do so. The Administrator's decision in *Star-Kist Caribe*, however, admonished that mere readoption of a pre-1977 standard without substantive revisions would *not* qualify as a new or revised standard. 3 E.A.D. 172, 178, no. 10 ("Of course, post-July 1, 1977 readoption of a pre-July 1977 standard without any substantive changes would not open the door to schedules of compliance because the standard would have been one that was in effect prior to July 1, 1977." (emphasis added)).

Following the *Star-Kist Caribe* decision, EPA reviews compliance schedule-authorizing provisions submitted by States under 40 CFR § 131.13. See 3 E.A.D. 172, 182, footnote 16, and Order Denying Modification Request, 4 EAD 33, footnote 16. In reviewing these provisions, EPA considers whether they are consistent with the CWA and EPA regulations[3] and may therefore be approved. In California, several Regional Boards have compliance schedule-authorizing provisions in their Basin Plans; the State has in place a compliance schedule-authorizing provision applicable to California Toxics Rule ("CTR") criteria; and other compliance schedule-authorizing provisions are under consideration by Regional Boards and/or the State Board pursuant to the State's administrative process.

[3] For example, EPA's regulation at 40 CFR § 122.47 requires that states may authorize compliance schedules where appropriate and require compliance with the final effluent limitation as soon as possible. Additionally, any NPDES permit establishing a compliance date more than one year from permit issuance shall set forth interim requirements and dates for their achievement and/or progress reports.

2. The Regional Board's provisions authorizing compliance schedules that may either exceed five years or exceed the term of an NPDES permit

The Regional Board provisions that EPA is approving authorize compliance schedules that in limited situations may either exceed five years and/or the term of an NPDES permit. Under the amendment, a five-year compliance schedule may be renewed for up to an additional five years under specified circumstances. Under this extension provision, a five-year compliance schedule can be extended only when all the terms of the compliance schedule have been complied with, but, contrary to original expectations, the permittee was not able to achieve compliance with the final WQBEL.[4] Additionally, compliance schedules that may exceed the term of an NPDES permit are authorized when certain TMDLs have been developed and new WQBELs are necessary to implement the wasteload allocation in the TMDL. It is important to note that in authorizing any compliance schedule in a particular permit, it is necessary, under both EPA regulations at 40 CFR §122.47 and the Basin Plan amendment, that the schedule provide for achieving the final WQBEL in as short a period as possible.[5]

During the state administrative process for this amendment, the Ecological Rights Foundation ("ERF") submitted comments to the Regional Board and State Board, and sent an email to EPA, raising concerns with allowing any compliance schedule that would either extend beyond five years or that would exceed the five-year term of an NPDES permit.[6] ERF raised a number of concerns with the provisions discussed in the preceding paragraph. Below are responses to the issues raised by ERF.

(i) Compliance schedules beyond five years

ERF raised an issue that allowing a compliance schedule to extend beyond five years "overlooks that NPDES permits must be limited to fixed terms of no more than five years." (ERC Comments Before SWRCB, 4-9-04, p. 14.) The five-year permit term required by CWA sec. 402(b)(1)(B) does not, however, establish a statutory deadline for meeting water quality-based effluent limitations. It is clear from the statutory structure that the statutory deadlines for water quality-based effluent limitations are set forth in section 301 of the CWA. As discussed above, there is no limitation in section 301(b)(1)(C) on the term of a compliance schedule to meet effluent limitations derived to implement water quality standards adopted or revised after 1977.

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[4] This provision is discussed in more detail in the Regional Board Executive Officer's clarification letter of December 13, 2005, as also discussed in today's decision letter.

[5] Determinations of "appropriateness" and "as soon as possible" are made at the individual permit stage, and are requirements of the Regional Board 1 compliance schedule-authorizing provisions.

[6] Email from Chris Sproul to Doug Eberhardt dated 3/24/04; Petition for Review before California State Water Resources Control Board dated 4/9/04; Letter from Environmental Advocates to California Regional Water Quality Control Board, North Coast Region, dated 3/12/04; Letter from Environmental Advocates to State Water Resources Control Board dated 5/4/04. State responses to these comments are included in the Administrative Record for the State's action and were reviewed by EPA as part of our consideration of the amendment. As noted in EPA's response to the 3/24/04 email, EPA does not solicit comments when we act on State water quality standards.

Section 402(b)(1)(B) requires that any State seeking approval to administer its own NPDES program have authority to issue permits for fixed terms not exceeding five years. Section 402(b)(1)(B)'s requirement is included so that states will revisit their authorizations to discharge every five years, thereby providing regular, periodic review of permits to ensure that they are up-to-date and contain appropriate conditions. When EPA is the permit-issuing authority, EPA is subject to the same restrictions on permit terms. CWA sec. 402(a)(3). By limiting the permit term to five years, Congress intended that both the permit holder and the permitting authority review the permit conditions on a regular basis, giving the permit holder a forum and an official opportunity to suggest changes to permit conditions that, in its opinion, are no longer appropriate, and ensuring that the permitting authority considers, on a regular basis, whether new requirements are necessary – for example, new effluent limitations necessary to incorporate newly-promulgated water quality standards.[7] Nowhere in the CWA or its legislative history is there an indication that Congress intended for section 402(b) to serve as a limitation on the permit writer's authority to adopt appropriate permit conditions in accordance with the substantive requirements of the CWA, which are contained elsewhere in the statute, e.g., CWA sec. 301(b)(1)(C), not in the solely procedural requirement of CWA sec. 402(b) cited by ERF.

As discussed above, section 301(b)(1)(C) contains a statutory deadline for water quality-based effluent limits based on water quality standards established prior to July 1, 1977. *In the Matter of Star-Kist Caribe, Inc.,* 3 E.A.D. 172, 177, 184-5 (1990). After July 1, 1977, states may provide for compliance schedules in NDPES permits only "if a State has laid the necessary groundwork in its standards or implementing regulations." *In the Matter of Star-Kist Caribe, Inc.,* 3 E.A.D. 172, 176-7 (1990). Section 303(e)(3)(F) expressly contemplates that states would establish compliance schedule-authorizing provisions for new or revised water quality standards.

There is no restriction in the Clean Water Act that limits compliance schedules for all water quality-based effluent limitations to no more than five years. Similarly, EPA regulations at 40 CFR § 122.47 do not limit the term of compliance schedules. Rather, EPA's regulations require that a compliance schedule to meet a water quality-based effluent limitation be justified as being "appropriate" and "as soon as possible." This determination is made at the individual permit stage, and is included as a requirement of the RB1 compliance schedule-authorizing provisions.

Finally, we emphasize that our conclusion that neither the CWA nor EPA regulations prohibits compliance schedules extending beyond five years should not be read as limiting a State's discretion, if it chooses to adopt a compliance schedule-authorizing provision, to limit the authorizing provision to compliance schedules of five

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[7] Even the administrative requirement to revisit the NPDES permit requirements once every five years is not absolute. The permit term provision of the CWA is subject to section 558(c) of the APA, which provides for continuance of permits only where the permittee has a permit for an activity "of a continuing nature" and the permittee "has made timely and sufficient application for renewal of a new license." EPA and California have issued regulations similar to APA sec. 558(c). See EPA permit regulations at 40 CFR § 122.6, and California's administrative continuance provision at 23 CCR § 2235.4.

years or even a shorter duration. Similarly, if the State chooses to authorize longer compliance schedules, the State may also choose to limit the circumstances under which longer compliance schedules can be used. EPA, when it has promulgated compliance schedule-authorizing provisions, has chosen to limit the duration of such schedules. In the BEACH Act Rule, for example, EPA limited compliance schedules to five years based on the determination that five years "is a reasonable limit on the length of a compliance schedule" for the new bacteria criteria promulgated in the rule, and also considering the specific types of processes that facilities may have to change to meet the new criteria. See 69 Fed. Reg. 67217 at 67229. States, when developing compliance schedule-authorizing provisions, may similarly limit the duration of such schedules based on policy considerations. In general, this is what Regional Board 1 has done.

(ii) Compliance schedules that extend beyond the term of a permit

Second, under appropriate circumstances, a compliance schedule may extend beyond the term of an NPDES permit.[8] The issue is whether a permit that includes a compliance schedule extending beyond the term of an NPDES permit complies with CWA sec. 301(b)(1)(C). That section requires that permits include effluent limitations as stringent as necessary to meet water quality standards "and schedules of compliance." Effluent limitations based on the State's water quality standards, including compliance schedule-authorizing provisions, fully comply with CWA sec. 301(b)(1)(C).

As discussed above, States may adopt provisions authorizing compliance schedules as part of their water quality standards. In *Star-Kist*, the Administrator held that compliance schedules are a component of water quality standards under 40 C.F.R. § 131.13:

> Section 131.13 of the regulations authorizes the States, at their discretion (but subject to EPA approval), to include in their water quality standards 'policies generally affecting their application and implementation, such as mixing zones, low flows and variances.' Logically, schedules of compliance fall within the category of 'policies' listed in this regulation. Moreover, as noted in the text, the Act itself contemplates schedules of compliance being authorized and used by the States. *See* §§301(b)(1)(C) and 303(e)(3)(A) and (F).

Star-Kist Caribe, 3 E.A.D.172, 182-183, note 16 (1990).

Effluent limitations that are written in a manner consistent with the State's authorizing provisions would be consistent with CWA sec. 301(b)(1)(C). That section explicitly provides that compliance schedules are appropriate components of water quality-based effluent limitations. (Effluent limitations are to be established to meet "water quality standards, treatment standards, or schedules of compliance....") Such effluent limitations also would be fully consistent with the CWA's definition of "effluent limitation," which includes "schedules of compliance." CWA sec. 502(11). Permits

[8] Even a compliance schedule of five years or less might extend beyond a permit term if, for example, it was established as part of a permit modification issued during the five-year term of an existing permit.

written consistent with water quality standards that authorize compliance schedules when implementing those standards, therefore, would be fully consistent with the requirements of CWA sec. 301(b)(1)(C).

Section 301(b)(1)(C) thus allows the permit authority to take into account applicable water quality criteria, designated uses, and the compliance schedule in developing an effluent limitation. Such effluent limitations would also be fully consistent with EPA's permitting regulations at 40 CFR §122.44(d)(1)(vii)(A), which requires a water quality-based effluent limitation to be "derived from, and compl[y] with" water quality standards, and 40 CFR §122.44(d)(1), which provides that the permit must include "requirements...necessary...to [a]chieve water quality standards." Arguing that these provisions preclude allowance of compliance schedules longer than the permit term ignores the longstanding interpretation by the Administrator in the 1990 *Star-Kist Caribe* case that compliance schedule- authorizing provisions are a component of water quality standards.

ERF also commented that allowing compliance schedules to exceed the permit term would be inconsistent with the Act because such limits may be unenforceable. (ERF comments before the SWRCB, 4-09-04 at 16.). EPA agrees that provisions of a compliance schedule need to be enforceable, as section 502(17) of the CWA defines a "schedule of compliance" as "an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." However, a compliance schedule that includes interim requirements and a final effluent limitation to be met beyond the permit term is enforceable, where all of the requirements of the compliance schedule, including those that extend beyond five years or even those that begin after the fifth year, are included as permit terms.

All permit terms, including those of a compliance schedule, are enforceable permit provisions. See e.g., *Locust Lane v. Swarta Township Authority*, 636 F.Supp. 534, 539 (M.D. Pa. 1986) ("We see no reason to distinguish between effluent limitations and compliance schedules for purposes of citizen suit enforcement under section 505.") Inclusion of all the actions necessary under the compliance schedule, including the interim requirements and the final effluent limitation, as terms of the permit makes the permit consistent with the definition of compliance schedule in the CWA and the regulatory definition of compliance schedule as a "schedule of remedial measures included in a 'permit'...." 40 CFR §122.2.

Additionally, inclusion of the entire compliance schedule will ensure that the permit contains "requirements . . . necessary. . . to [a]chieve water quality standards," as required by 40 CFR §122.44(d)(1), and limits "derived from, and [that comply] with" water quality standards (40 CFR §122.44(d)(1)(vii)) – requirements implementing the CWA's requirement in section 301(b)(1)(C) to include "any more stringent limitation, including those necessary to meet water quality standards."[9] Therefore, by including the entire compliance schedule as an enforceable provision of the permit, the Regional Board

[9] EPA recently issued similar advice to the State of Indiana. (Letter from Jo Lynn Traub, EPA Region 5, to Bruno Pigott, Indiana Department of Environmental Management, August 7, 2006.)

will ensure that the permittee must meet the compliance schedule milestones that occur after the term of the permit regardless of whether the permit is reissued prior to the date of the milestones or whether the permit is administratively extended pending reissuance.[10]

3. Waterbody uses and UAA procedure

ERF also commented in the email to EPA discussed above that compliance schedules should not be considered a component of water quality standards, because under CWA sec. 303(c)(2)(A), the components of water quality standards are limited to uses and criteria. In the alternative, ERF asserted that if compliance schedules are considered part of the water quality standards, then the RB1 amendment is inappropriate because water quality criteria and uses cannot be relaxed without a use attainability analysis ("UAA"). ERF also asserted that, assuming the uses stay the same, a compliance schedule would allow a water quality criterion that does not attain uses, and ERF questioned how this can be lawful.

As discussed above, consistent with the provisions in CWA sec. 303(e)(3)(F), EPA's regulations at 40 CFR §131.13, and the Administrator's decision in the 1990 *Star-Kist Caribe* case, compliance schedule-authorizing provisions are a component of water quality standards.

ERF's contention that a UAA is required as a prerequisite to establishing a compliance schedule is unfounded. The UAA procedure is, as the name suggests, a specific procedure required by EPA regulations to evaluate the attainability of uses. Under EPA's regulations at 40 CFR §131.10(j), such a use attainability analysis is required to be done when a State is designating or has designated uses that do not include the uses specified in sec. 101(a)(2) of the CWA, removing a designated use that is specified in CWA sec. 101(a)(2), or adopting a subcategory of a use specified in CWA sec. 101(a)(2) that requires less stringent criteria. 63 FR 36,742, 36,756 (July 7, 1998). See also 40 CFR §131.3(g) definition of UAA. The UAA requirement at 40 CFR § 131.10(j) ensures that in revising designated uses, the State assesses attainability of the prior designated uses and the potential new use designations. It does not apply to establishment of water quality criteria, antidegradation provisions, or compliance schedule-authorizing provisions included in state standards under 40 CFR §131.13.

Finally, we agree that water quality criteria must protect designated uses. However, a compliance schedule-authorizing provision does not change the applicable designated use or water quality criteria that apply to a particular waterbody. Rather, a compliance schedule-authorizing provision merely allows the permitting authority to grant a discharger time, where appropriately justified and with enforceable requirements,

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[10] In the December 12, 2005, clarification letter, the Regional Board indicated it would include the entire compliance schedule in the fact sheet for the permit. We agree this should be done, and do not think this commitment in any way would preclude the Regional Board from including the entire schedule, including the final effluent limitation, as enforceable permit provisions.

to meet the applicable water quality-based effluent limitations derived to meet the applicable uses and criteria.

4. Effect on CWA programs

In its comments to the State, ERF asserted that the compliance schedule-authorizing provision delays progress towards addressing water quality problems; that the compliance schedule provision will result in delayed implementation of upcoming TMDLs; and that the compliance schedule provision serves no legitimate purpose and is aimed at "shielding polluters."[11]

The Regional Board (State Administrative Record p. 375) responded as follows:

> The proposed amendment serves only to add language to the Basin Plan providing a mechanism for the Regional Water Board to exercise its discretion, in limited, appropriate circumstances, to allow for Schedules of Compliance. To even be considered for a compliance schedule, the permittee must demonstrate to the satisfaction of the Regional Water Board that it is technically and economically infeasible to achieve immediate compliance with new permitting requirements, and meet the other specific criteria and conditions set out in the Amendment.... [S]chedules of compliance will be considered on a case-by-case basis with full public participation. ...[T]he permittee would be required to meet all of the conditions described in the amendment. This includes the provision that compliance is achieved in the shortest period of time and that the highest-quality discharge that is technically and economically feasible, be achieved and maintained in the interim.
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> We believe that the appropriate and most effective time to address the concerns expressed are during the public process which will be mandatory for each individual NPDES permit prior to board consideration for allowing a schedule of compliance.
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> ...
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> The proposed amendment is necessary to return the options available to the Board prior to the *StarKist Caribe* decision and to provide fair and reasonable regulation in specific cases. Specifically, in cases where it has been satisfactorily demonstrated that it is technically and economically infeasible to achieve immediate compliance with new permit effluent and/or receiving water limitations. This Amendment is not intended to "promote the reputation and public perception of the entities it regulates," as suggested in this comment. Board staff agrees that enforcement orders play a very important part in the regulation of dischargers, particularly in cases of recalcitrant dischargers. This is intended only as a tool to more effectively ensure that Dischargers can come into compliance with new effluent limits.

[11] See Letter from Environmental Advocates to Regional Board, 3/12/04, p. 5-9.

We agree with this analysis, and consider the State's interpretation to be consistent with the CWA, given the recognition of compliance schedules in the CWA as an authorized mechanism to achieve water quality-based effluent limitations that will result in achievement of water quality standards. See, e.g. CWA sec. 303(e)(A) and (F), which provide that plans under the State's continuing planning process shall include "effluent limitations and schedules of compliance" and also "adequate implementation, including schedules of compliance, for revised or new water quality standards." See also the discussion above that the Clean Water Act explicitly provides that compliance schedules are appropriate components of water quality-based effluent limitations.